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No. 07-1125

IN THE
Supreme Court of the United States

LISA FITZGERALD, *et vir.*,

Petitioners,

v.

BARNSTABLE SCHOOL COMMITTEE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS BARNSTABLE SCHOOL COMMITTEE AND DR. RUSSELL DEVER

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QUESTIONS PRESENTED

The questions presented in this case should be stated as:

Whether Title IX's remedial scheme precludes virtually identical § 1983 claims based upon the Equal Protection Clause for sex discrimination by federally funded educational institutions.

Whether the First Circuit's conclusion that Respondents did not act with deliberate indifference to Petitioners' complaints of sexual harassment precludes Petitioners from showing the deliberate indifference necessary to prove their § 1983 equal protection claims.

Whether Petitioners' failure to assert and/or preserve for appeal viable § 1983 equal protection claims for disparate treatment based on gender requires judgment in Respondents' favor regardless of Title IX's preclusive effect on such claims.

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STATEMENT OF THE CASE

This case involves the interplay between two statutes – Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88 ("Title IX"), and 42 U.S.C. § 1983 ("§ 1983") – when concurrent claims under each are based on the same facts and theories of liability arising out of allegations of third party, student-on-student sexual harassment in the school setting. This case can and should be resolved in favor of the Respondents (the Barnstable School Committee and Superintendent Russell J. Dever) without regard to the question presented by the Petitioners (the Fitzgeralds) because the Fitzgeralds' § 1983 claims based on the Equal Protection Clause are barred as deficiently pled, waived and/or conclusively litigated below. In any event, application of this Court's well-established precedent compels a finding that Title IX's comprehensive remedial scheme precludes the Fitzgeralds from pursuing their identical § 1983 equal protection claims against the School Committee and Superintendent Dever.

I. UNDERLYING FACTS[1]

The Fitzgeralds allege that their kindergartener daughter was sexually harassed by another student – an eight-year-old boy – on the school bus.[2] Pet. App. 2a-4a.

1. Citations herein to "Pet. App." refer to the Appendix to the Petition, "JA" to the Joint Appendix, "Pet." to the Petition for a Writ of Certiorari and "Pet. Br." to the Brief for Petitioners.

2. Despite the First Circuit's very different findings of fact based on the undisputed record after discovery, Pet. App. 2a-4a, the Fitzgeralds' brief avers "facts" based largely on their Complaint allegations. Pet. Br. 5-8. Given that the Fitzgeralds do not challenge the court of appeal's factual findings here, *see* Pet. Br. 8-9 n.1, the true, undisputed facts as found by the First Circuit are stated herein.

Specifically, on the morning of February 14, 2001, Jacqueline Fitzgerald informed her parents that each time she wore a dress to school — typically, two to three times a week — a fellow student on her school bus would cause her to lift her skirt. *Id.* at 2a. There are no allegations that the incidents involved any touching. JA 12a-25a; Pet. App. 27a. The Fitzgeralds called the principal of Jacqueline's school, Frederick Scully, to report the allegations. Pet. App. 2a.

That morning, Scully and Lynda Day, the school's prevention specialist responsible for responding to reports of inappropriate student behavior, met with the Fitzgeralds. *Id.* Because Scully and Day were unable to identify the alleged perpetrator from Jacqueline's description, they arranged – over the next two days – for her to surreptitiously observe students disembarking from the school bus. *Id.* at 2a-3a.

After Jacqueline finally tentatively identified the perpetrator as Briton Oleson, a third-grader, both Scully and Day questioned Briton, who steadfastly denied the allegations. *Id.* at 3a. Day then interviewed the bus driver and between 35 and 50 children who regularly rode the bus, but was unable to corroborate Jacqueline's version of the relevant events. *Id.*; Pet. App. 28a.

Shortly thereafter, the Fitzgeralds informed Scully that Jacqueline was now alleging that, in addition to causing her to lift her dress, Briton had insisted that she pull down her underpants and spread her legs. *Id.* Scully immediately held another meeting with the Fitzgeralds to discuss this new claim, re-interrogated Briton and followed up on the interviews that Day had conducted. *Id.*

By this time, the local police department had launched a concurrent investigation, handled by a detective specializing in juvenile matters, Reid Hall. *Id.* Among other things, Hall questioned both Jacqueline and Briton. *Id.* Hall found Briton to be credible, and the police department ultimately determined that there was insufficient evidence to proceed criminally against him. *Id.* Relying in part on this decision and in part on the results of the school's own comprehensive investigation, Scully concluded that there was insufficient evidence to discipline Briton. *Id.*

Since their initial complaint, the Fitzgeralds had been driving Jacqueline to and from school. *Id.* In late February, and despite its continuing inability to substantiate Jacqueline's claims, the school offered to place Jacqueline on a different bus or, alternatively, to maintain rows of empty seats between the kindergarten students and the older pupils on the original bus. *Id.* at 3a-4a. The Fitzgeralds rejected these suggestions, instead insisting on a series of other demands, including placing a monitor on the bus and transferring Briton to a different bus. *Id.* at 4a. The school system's superintendent, Russell Dever, declined to implement these demands. *Id.* Dever's refusal to accede to the Fitzgeralds' demands constitutes the entirety of his involvement in this matter and the sole factual basis for his inclusion as a party to this lawsuit. *Id.* at 23a, 25a. *See also* JA 18a-19a (¶¶ 33-38).

Given that Jacqueline was removed from the school bus by the Fitzgeralds, there were no incidents aboard the bus after February 14, 2001. Pet. App. 4a. However, the Fitzgeralds claim that Jacqueline was periodically

distressed when seeing Briton in the school hallways and, during the next school year, when a gym teacher with no knowledge of the Fitzgeralds' allegations urged students, including Jacqueline, to "high-five" Briton in a mixed-grade gym class. *Id*. As he had with all of the previous reports from the Fitzgeralds, Scully acknowledged and addressed each of these incidents immediately upon his receipt of notice thereof. *Id*.

II. PROCEDURAL BACKGROUND

On or about April 3, 2002, the Fitzgeralds filed suit in the U.S. District Court for the District of Massachusetts, alleging claims under: 1) Title IX against the School Committee; 2) § 1983 against the School Committee and Superintendent Dever; and 3) state law against both Respondents. JA 21a-24a (¶¶ 51-69). By Order dated September 9, 2004, the district court dismissed all claims but the Title IX claim against the School Committee. *See* Pet. App. 43a-61a. Following discovery, the district court, by Memorandum and Order dated October 17, 2006, granted summary judgment in the School Committee's favor on the Title IX claim. *Id.* at 26a-41a.

On appeal, the U.S. Court of Appeals for the First Circuit affirmed the district court's decisions on grounds different from the district court.[3] *Id.* at 1a-25a.

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3. As the Fitzgeralds did not pursue their dismissed state law claims on appeal, the First Circuit's decision addressed only the Title IX claim and the § 1983 claims.

A. The Title IX Claim.

As an initial matter, the First Circuit noted that it did not condone harassment, but recognized that in the circumstances of this case, where one student is alleged to have harassed another, school districts "have limited ability to guard against such incidents." *Id.* at 1a. In its *de novo* review of the district court decisions, the First Circuit viewed the facts in the light most favorable to the Fitzgeralds and concluded that:

> Title IX does not require educational institutions to take heroic measures, to perform flawless investigations, to craft perfect solutions, or to adopt strategies advocated by parents. The test is objective – whether the institution's response, evaluated in the light of the known circumstances, is so deficient as to be clearly unreasonable. The response here cannot plausibly be characterized in that derogatory manner.

Id. at 12a. Indeed, far from clearly unreasonable, the First Circuit found the school's response to be affirmatively reasonable:

> The school reacted promptly to the complaint; commenced a full-scale investigation; and pursued the investigation diligently. As the scenario unfolded, school officials paid close attention to new information, emerging developments, and the parents' concerns. Given its inability to corroborate Jacqueline's allegations and the termination of the police

> investigation with no recommendation for further action, the defendants' refusal to institute disciplinary measures against Briton was reasonable.

Id. at 12a. Similarly, the court of appeals found that school officials' offer of remedial measures – allowing Jacqueline to ride a different bus or rows of empty seats between kindergarteners and other students on the bus – was "suitable." *Id.* at 13a.

Hence, finding that "[t]here is no competent evidence here that the school's investigation was bungled," *Id.* at 14a, the First Circuit concluded that "no rational factfinder could supportably conclude that the School Committee acted with deliberate indifference in this case," *Id.* at 16a, and affirmed summary judgment in favor of the School Committee. *Id.* at 10a-16a. The Fitzgeralds do not seek review of the First Circuit's rulings of fact or law on their Title IX claim. Pet. i; Pet. Br. i, 8-9 n.1.

B. The § 1983 Claims.

The First Circuit next affirmed the district court's dismissal of the Fitzgeralds' § 1983 claims against the School Committee and Superintendent Dever. The Fitzgeralds claimed that both Respondents violated their statutory rights under Title IX and their equal protection under the Constitution.

In dismissing the Fitzgerald's §1983 claims based on Title IX, the court of appeals invoked the well-established rule of *Middlesex County Sewer. Auth. v.*

Nat'l Sea Clammers Ass'n, 453 U.S. 1, 19-21 (1981), that § 1983 cannot be used to enforce a statute when that statute's remedial scheme is sufficiently comprehensive as to demonstrate Congress's intent to limit the available remedies to those provided by the statute itself. *Id.* at 17a-20a. The First Circuit, relying on the Court's determination in *Cannon v. Univ. of Chicago*, 441 U.S. 677, 694-703 (1979), that Congress intended to provide an implied private right of action in Title IX, *Id.* at 19a-20a, opined that

> whenever the underlying statute contained a private right of action (express or implied), the Court has deemed that fact to be strong evidence of congressional intent to preclude parallel actions under 1983. Thus, the existence of a private judicial remedy often has proved to be, in practical effect, "the dividing line between those cases in which [the Court has] held that an action would lie under § 1983 and those in which [it has] held that it would not." *City of Rancho Palos Verdes*, 544 U.S. [113 (2005)] at 121.

Id. at 20a (citation omitted). And this, the court of appeals ruled, is true regardless of whether the claim is brought against educational institutions or their individual employees. *Id.* at 20a-22a, citing *Smith v. Robinson*, 468 U.S. 992, 1010-11 (1984). The Fitzgeralds do not challenge the First Circuit's ruling affirming the dismissal of their § 1983 statutory claims. Pet. i; Pet. Br. i, 8-9 n.1.

As to the Fitzgeralds' § 1983 constitutional claims against the School Committee and Superintendent Dever, the First Circuit held that any equal protection claims based on the "virtually identical" facts presented in support of the Fitzgeralds' claims under Title IX were precluded.[4] *Id.* at 23a-25a. The court of appeals applied the analytic framework in *Smith*, 468 U.S. at 1009, concluding that:

> The comprehensiveness of Title IX's remedial scheme – especially as embodied in its implied private right of action – indicates that Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions – and that is true whether the suit is brought against the educational institution itself or the flesh-and-blood decisionmaker who conceived and carried out the institution's response. It follows that the [Fitzgeralds'] equal protection claims are also precluded.

Id. at 24a.

Significantly, the First Circuit emphasized that its ruling, based on the claims as presented in this case, should not be read to imply that a plaintiff may *never* bring a § 1983 constitutional claim concurrently with a Title IX claim. *Id.* at 24a. The court of appeals recognized that, for example, a plaintiff could sue an individual

4. The First Circuit did not address the school's arguments that no equal protection claim was properly alleged or preserved for appeal.

school employee who is himself alleged to be immediately responsible for the injury – be it based on equal protection or some other constitutional theory.[5] *Id*. Such a claim, based upon a particular individual's, independent wrongdoing, would not be preempted because it would not be "virtually identical" to any concurrent Title IX claim. *Id.* at 24a-25a. Thus, the First Circuit concluded that Title IX preempted the Fitzgeralds' putative § 1983 student-on-student sexual harassment claims based on the Equal Protection Clause, as those claims were presented in this case.

Abandoning any appeal of the First Circuit's rulings against them on their Title IX and § 1983 statutory claims, the Fitzgeralds then sought certiorari on the single question:

> Whether Title IX's implied right of action precludes Section 1983 constitutional claims to remedy sex discrimination by federally funded educational institutions.[6]

See Pet. i. By Order dated June 9, 2008, the Court granted certiorari on this question.

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5. Notably, the First Circuit's "coda" related not to student-on-student harassment, but to cases involving potential state actors, that is, employees of the educational institution. *Id.* at 24a.

6. As discussed below, the Fitzgeralds' attempt to present a much broader question in their opening brief should be rejected. *See* Argument § II below.

INTRODUCTION AND SUMMARY OF ARGUMENT

Title IX broadly prohibits sex discrimination by educational institutions receiving federal funds.[7] In furtherance of its aims, Title IX allows private actions for damages against such educational institutions for their allegedly discriminatory programs and activities, *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979); *Franklin v. Gwinnett County Public Sch.*, 503 U.S. 60 (1992), and in certain situations arising out of sexual harassment of students by third parties – that is, by teachers, *Gebser v. Lago Vista Independent Sch. Dist.*, 524 U.S. 274 (1998), and by other students, *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999). To make out a Title IX claim based on third party sexual harassment, a plaintiff must show, among other things, that the school district acted with deliberate indifference to sexual harassment about which it had actual knowledge. *Gebser*, 524 U.S. at 290-91; *Davis*, 526 U.S. at 650.

42 U.S.C. § 1983 ("§ 1983") allows private actions against state actors to enforce federal constitutional and statutory rights.[8] As such, § 1983 may generally be used

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7. In relevant part, Title IX provides that: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

8. In relevant part, § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State

(Cont'd)

to challenge governmental violations of the Fourteenth Amendment's guarantee of equal protection, which requires similar treatment of all persons similarly situated. In the context of third party sexual harassment, a § 1983 plaintiff must show, among other things, that the local governmental entity and/or its officials responded to the harassment with deliberate indifference. *See*, *e.g.*, *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1135 (9th Cir. 2003); *Murrell v. School Dist. No. 1*, 186 F.3d 1238, 1250 (10th Cir. 1999); *Crawford v. Davis*, 109 F.3d 1281, 1282-83 (8th Cir. 1997); *Nabozny v. Podlesny*, 92 F.3d 446, 454 (7th Cir. 1996).

The Fitzgeralds argue that their Title IX student-on-student sexual harassment claim against the School Committee should not have precluded their § 1983 equal protection claims against the School Committee and Superintendent Dever individually, even though the claims are factually identical and the basic standard of liability applicable to each – deliberate indifference – is the same under both statutes. Regardless of the merits of their broad preclusion question, the Fitzgeralds maintain no viable § 1983 equal protection claim on which to proceed.

(Cont'd)

> or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983.

Most clearly, in pursuit of their Title IX claim the Fitzgeralds fully litigated their sole complaint contention that the school acted with deliberate indifference to the sexual harassment about which they complained. The First Circuit's factual and legal determination that neither the School Committee nor Superintendent Dever acted with deliberate indifference is conclusive. The Fitzgeralds, who do not challenge that finding here, cannot relitigate their deliberate indifference allegation under the mantle of a constitutional equal protection claim under § 1983.

Indeed, despite basing their complaint solely on deliberate indifference, the Fitzgeralds now attempt to claim that the dismissal of their § 1983 equal protection claim wrongfully prevented them from pursuing disparate treatment theories of liability. This claim fails for two reasons. First, as an overarching matter, the Fitzgeralds failed to allege or support with developed argumentation that their claimed injury was the result of an institutional policy or custom, as is required to hold the School Committee liable under § 1983. Second, and similarly, the Fitzgeralds never pled any disparate treatment theory below, nor did they attempt to support it in any meaningful way or preserve it for appeal. As such, the Fitzgeralds maintain no viable § 1983 equal protection claims based on disparate treatment against the School Committee or Superintendent Dever and this case should be resolved in the Respondents' favor regardless of the question presented.

Yet, even if the Court reaches the merits of the question presented, the Respondents should prevail. As an initial matter, the Fitzgeralds significantly enlarged

the scope of the question presented in their petition. That question, which addresses the propriety of Title IX preclusion of § 1983 constitutional claims to remedy sex discrimination *by federally funded educational institutions*, is much more limited than the question in the Fitzgeralds' merits brief, which covers claims of *unconstitutional gender discrimination in schools* no matter whom the perpetrator. Because this Court's rules and precedent prohibit a petitioner from pursuing questions not raised by the petition, any aspect of a § 1983 claim against Superintendent Dever – who is not a federally funded educational institution – should be ignored as outside the petition.

In any event, the Fitzgeralds § 1983 claims – as presented in this case – were properly precluded by Title IX. This case falls squarely within the Court's established precedent in *Smith v. Robinson*, 468 U.S. 992 (1984) and *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005), which hold that a sufficiently comprehensive remedial statute may preclude § 1983 constitutional claims that are virtually identical to those that are or could be brought under the statute.

Here, given its complex administrative enforcement scheme and its private cause of action for damages, there can be no doubt that Title IX offers a comprehensive remedial scheme, raising the presumption that Congress intended it to exclusively govern claims of sex discrimination in education. Furthermore, the Fitzgeralds' Title IX and § 1983 claims are virtually identical, based on the same factual allegations and based on the same theory of liability – that is, that school officials failed to adequately respond

to their complaints of student-on-student sexual harassment – making preclusion a common-sense result.

The fact that Title IX provides remedies in significant ways more restrictive than § 1983 is further evidence of Congress's intent to preclude resort to § 1983, which is not so limited. Thus, under *Smith* and *Rancho Palos Verdes*, Congress intended that Title IX preclude virtually identical § 1983 equal protection claims for sex discrimination in education.

Finally, examination of the precedent surrounding constitutional tort actions first recognized in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), underscores the rationale and reasonableness of Title IX preclusion of the § 1983 claims in this case. Providing a constitutional tort against federal officers, *Bivens* actions are analogous to § 1983 constitutional claims against municipal actors. And just as § 1983 constitutional claims are precluded by alternative statutory remedies, so too are *Bivens* actions – indeed, even more so, as statutory preclusion requires only "meaningful remedies" that need not provide full relief. Thus, under *Bivens*, as under § 1983, there exists a long and well-accepted history of statutory provisions limiting constitution-based claims.

For all of these reasons, judgment in favor of the School Committee and Superintendent Dever should be affirmed.

ARGUMENT

I. THIS CASE CAN AND SHOULD BE RESOLVED IN RESPONDENTS' FAVOR WITHOUT REGARD TO THE QUESTION PRESENTED BECAUSE THE FITZGERALDS MAINTAIN NO VIABLE § 1983 EQUAL PROTECTION CLAIM.

In bringing this petition, the Fitzgeralds have one stated goal – to be able to pursue § 1983 claims based on the Equal Protection Clause. According to the Fitzgeralds, the lower courts' holdings that Title IX's comprehensive remedial scheme precluded their virtually identical § 1983 claims wrongfully prevented them from pursuing disparate treatment theories, specifically "the possibility that the school discriminated on the basis of sex in both the investigation and the proposed remedy."[9] Pet. Br. 10.

In reality, the Fitzgeralds have had every opportunity to plead (under Title IX and § 1983) and pursue (under Title IX) all theories of sex discrimination, including disparate treatment, but did not do so. Instead, they based their case exclusively on the theory that school officials responded to their complaints of harassment with deliberate indifference. Having fully litigated and lost on the sole issue raised below – deliberate indifference – the petition amounts to little

9. Given the First Circuit's ruling that the investigation and the remedies offered were objectively reasonable (Pet. App. 10a-16a), the Fitzgeralds could never hope to make such a showing. *See also* Pet. Br. 8-9 n.1 (acknowledging that court of appeal's determinations that school responded adequately "were not challenged in the petition for certiorari. . . .").

more than the Fitzgeralds' attempt to amend their complaint and relitigate their failed case under new theories of liability neither pled nor pursued below. This approach should not be countenanced.

A. The First Circuit's Finding That The School Did Not Act With Deliberate Indifference Bars The Fitzgeralds From Showing The Deliberate Indifference Necessary To Prove Their § 1983 Equal Protection Claims.

1. The applicable standards of liability under § 1983 and Title IX are the same: deliberate indifference.

As this Court has long recognized, a party advancing an equal protection claim under § 1983 must prove the existence of intentional, purposeful discrimination motivating the alleged state action. *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 274 (1979); *Washington v. Davis*, 426 U.S. 229, 246-50 (1976). In the context of § 1983 claims based on sexual harassment perpetrated by private, third party actors, courts have necessarily focused on the official response to the private harassment, concluding that a municipality's and/or municipal official's deliberate indifference in failing to investigate and address the harassment may constitute purposeful discrimination for equal protection purposes.[10]

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10. As more fully addressed below, *see* Argument § I.B., municipal liability under § 1983, as opposed to that of an individual municipal official, also requires a showing that an official policy or custom of the entity resulted in the deprivation. *See Monell v. Department of Social Serv.*, 436 U.S. 658 (1978). The Fitzgeralds have failed to allege or show the existence of any custom or policy in this case.

See, *e.g.*, *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1135 (9th Cir. 2003); *Murrell v. School Dist. No. 1*, 186 F.3d 1238, 1250 (10th Cir. 1999); *Crawford v. Davis*, 109 F.3d 1281, 1282-83 (8th Cir. 1997); *Nabozny v. Podlesny*, 92 F.3d 446, 454 (7th Cir. 1996). *Cf. Franklin*, 503 U.S. at 706 (holding that Title IX plaintiff must show "intentional discrimination") and *Gebser*, 524 U.S. at 290-291 (holding that Title IX plaintiff may prove claim by showing "deliberate indifference").

Thus, a plaintiff in a case such as this, involving student-on-student harassment, may present a viable § 1983 equal protection claim by either alleging intentional discrimination based on gender or by claiming that the official response to complaints of sexual harassment was deliberately indifferent. *See*, *e.g.*, *Flores*, 324 F.3d at 1135 (holding equal protection "plaintiffs must show either that the defendants acted either intentionally or with deliberate indifference"); *Nabozny*, 92 F.3d at 454 (stating equal protection plaintiff "must show that the defendants acted either intentionally or with deliberate indifference").[11]

Under Title IX, to recover for sexual harassment by a teacher or another student, a complaining student must prove the same thing – that is, that the school district acted with deliberate indifference to the sexual harassment. *Gebser*, 524 U.S. at 290-91; *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999). Indeed,

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11. This Court has not specifically ruled that deliberate indifference could support an equal protection claim in this context. To the extent that the Court disagrees with this construct, the Fitzgeralds have wholly failed to state any viable equal protection claim. *See* Argument § I.B.3. below.

the Court explicitly adopted the Title IX deliberate indifference standard from its § 1983 case law, specifically "claims under § 1983 alleging that a municipality's actions in failing to prevent a deprivation of federal rights was the cause of the violation." *Gebser*, 524 U.S. at 290-91, citing *Board of Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397 (1997) and *Canton v. Harris*, 489 U.S. 378 (1989).

Thus, "liability under Title IX and § 1983 is comparable." *Klemencic v. Ohio State Univ.*, 263 F.3d 504, 510 (6th Cir. 2001), citing *Gebser*, 524 U.S. at 291. *See also Flores*, 324 F.3d at 1135. The Fitzgeralds admit as much: "The standard for individual liability under section 1983 is the same as for violations of Title IX: deliberate indifference." JA 37a (citing *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 896 (1st Cir. 1988)).

2. The Fitzgeralds' Title IX and § 1983 claims are identical and raise a single issue: deliberate indifference.

Here, the Fitzgeralds' Title IX claim against the School Committee and their § 1983 claims against the School Committee and Superintendent Dever are identical. All are based on the same facts and theory of liability, that is, that the School Committee, through Superintendent Dever, responded to their complaints of sexual harassment with deliberate indifference. *See* JA 12a-25a.

More specifically, the Fitzgeralds alleged in their complaint that: "Defendants have persistently acted and continue to act with deliberate indifference to the

discrimination perpetrated against and resultant harm done to the minor plaintiff" (JA 21a (¶ 47)); "Defendants have engaged in a continuing pattern and practice of deliberate indifference to the civil rights of their student" (21a (¶ 48)); "The school failed to take immediate, effective remedial steps, and instead acted with deliberate indifference towards Jacqueline" (22a (¶ 58)); and "The superintendent failed to take immediate, effective remedial steps, and instead acted with deliberate indifference towards Jacqueline" (23a (¶ 60)).

Based on their complaint allegations, as well as their arguments before the district court and on appeal, the First Circuit specifically ruled that the Fitzgeralds' Title IX and § 1983 claims were identical and solely based on deliberate indifference. Thus, as with their Title IX claim, the Fitzgeralds "offer no theory of liability under the Equal Protection Clause other than the defendants' supposed failure to take adequate actions to prevent and/or remediate the peer-on-peer harassment that Jacqueline experienced." Pet App. 23a.

3. The Fitzgeralds fully litigated and lost the deliberate indifference issue under Title IX.

The district court dismissed the Fitzgeralds' § 1983 claims as precluded by their identical Title IX claim. Pet. App. 60a-61a. Nevertheless, the Fitzgeralds had every incentive to, and in fact did, fully litigate to conclusion their Title IX contention that their harassment complaints were met with deliberate indifference. *See* Pet. App. 5a-16a. And on this contention the

Fitzgeralds lost, the First Circuit concluding as a matter of undisputed fact and law that school officials did not act with deliberate indifference in investigating and offering to remedy the Fitzgeralds' complaints. *See* Pet. App. 10a-16a. *See also* Pet Br. 11 ("the court of appeals . . . rejected the petitioners' Title IX claim because it believed that the school's response to the harassment was objectively reasonable"). The Fitzgeralds' failure to seek certiorari on this aspect of the First Circuit's ruling makes it final and binding on them. *See Nat'l Park Hospitality Ass'n v. Department of the Interior*, 538 U.S. 803, 811 n.4 (2003).

There can be no doubt, moreover, that the First Circuit's finding of objective reasonableness is conclusive and covers both the School Committee's and Superintendent Dever's actions. As the First Circuit repeatedly emphasized, there was neither allegation nor evidence that Dever engaged in any conduct different from that attributable to the institution. Pet. App. 24a-25a. Here, Dever acted solely as the School Committee's "flesh-and-blood decisionmaker[ ] who conceived and carried out the institution's response." Pet. App. 24a. *See also* Pet. App. 25a ("The plaintiffs have not named Dever as a defendant based on any independent wrongdoing on his part but, rather, based on his role as the School Committee's ultimate decisionmaker"). Having failed to appeal this part of the court of appeal's ruling, this determination is also final and binding on the Fitzgeralds. *See Nat'l Park Hospitality Ass'n*, 538 U.S. at 811 n.4.

4. The Fitzgeralds are barred from relitigating the deliberate indifference issue as part of any § 1983 claim.

The First Circuit's finding that there was no deliberate indifference under Title IX precludes the Fitzgeralds from showing deliberate indifference under § 1983. *See Los Angeles v. Heller*, 475 U.S. 796 (1986) (per curiam). In *Heller*, the plaintiff, following his allegedly unconstitutional arrest, pursued § 1983 claims against an individual police officer, the city and the police commission. *Id.* at 797. After bifurcation for trial, a jury found that the officer did not commit a constitutional injury. *Id.* at 797-98. The Court ruled that the jury's finding as to the officer was conclusive as to the municipal entities – where the individual officer had not committed any underlying constitutional violation, the plaintiff simply could not show any such violation as to the municipal defendants. *Id.* at 799.

Here, the First Circuit ruled that Superintendent Dever, on the School Committee's behalf, did not act with deliberate indifference and that, therefore, the School Committee could not be held liable under Title IX. Pet. App. 10a-16a. This finding is conclusive under § 1983 – where Dever has been found not to have committed the underlying deliberate indifference, the Fitzgeralds simply cannot show any such violation as to the School Committee (or as to Dever himself) under the guise of a § 1983 constitutional claim.

Considerations underlying this Court's recognition of defensive issue preclusion in successive cases also preclude the Fitzgeralds from relitigating the deliberate

indifference issue. "To preclude parties from contesting matters they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. 147, 153-54 (1979). *See also Taylor v. Sturgell*, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008) (recognizing the bar to "'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment. . . .'"), quoting *New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2001).

Finally and forever bound by the First Circuit's rulings of fact and law on the issue of deliberate indifference, the Fitzgeralds are barred from pursuing their § 1983 claims as presented in this case. The First Circuit's decision should therefore be affirmed without regard to the question presented.

B. The Fitzgeralds Failed To Plead And/Or Waived Any § 1983 Equal Protection Claims Based On Disparate Treatment.

Despite their singular focus on deliberate indifference in the courts below, the Fitzgeralds now assert that they might be able to make out a § 1983 claim by showing that the School Committee and/or Superintendent Dever engaged in disparate treatment discrimination on the basis of Jacqueline's sex. Pet. Br. 10, 49. However, having neither pled nor pursued any policy or custom theory, there simply exists no viable § 1983 claim against the School Committee. Similarly,

having failed to plead or pursue any theory of disparate treatment under the Equal Protection Clause or Title IX against Dever (or the School Committee, for that matter), the Fitzgeralds cannot purport to advance such a theory now.

1. Because the Fitzgeralds failed to allege an injury caused by a municipal policy or custom, there exists no viable § 1983 claim against the School Committee.

It is well-settled that municipal governmental entities such as the School Committee cannot be held liable for claims under § 1983 – whether based on the constitution or federal statute – solely on a *respondeat superior* theory. *Monell v. Department of Social Serv.*, 436 U.S. 658, 690-95 (1978). Instead, to survive dismissal, a complaint stating a § 1983 claim against a municipality must allege the existence of an official "custom" (a practice, although not formally approved by an appropriate decision maker, so widespread as to have the force of law) or "policy" (a decision of an official who possesses final authority to establish municipal policy with respect to the action ordered) that caused the plaintiff's injury.[12] *Id.* at 90-95; *Brown*, 520 U.S. 397, 403 (1997) ("we have required a plaintiff seeking to impose liability on a municipality . . . to identify a municipal 'policy' or 'custom' that caused the plaintiff's injury").

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12. The "custom/policy" test distinguishes the acts of a municipality from those of its employees and holds the municipality liable only for those acts for which it is actually responsible. *Pembaur v. Cincinnati*, 475 U.S. 469, 479 (1986).

To state a viable § 1983 claim against a municipality, the complaint must allege a specific pattern or chain of incidents that would support the general allegation of a custom or policy. *Strauss v. City of Chicago*, 760 F.2d 765, 766-77 (7th Cir. 1985). An isolated incident involving the plaintiff will not be adequate. *Smith v. Chicago Sch. Reform Bd. of Trustees*, 165 F.3d 1142, 1149 (7th Cir. 1999); *Springdale Educ. Ass'n v. Springdale Sch. Dist.*, 133 F.3d 649, 653 (8th Cir. 1998).

Here, the Fitzgeralds' complaint neither invokes the terms "custom" or "policy" nor alleges any pattern or chain of incidents that would support such a policy or custom. *See* JA 12a-25a. Instead, the Fitzgeralds merely allege that the various actions (or inactions) of school officials in the wake of Jacqueline's harassment allegations were deliberately indifferent. *Id.* Therefore, there exists no viable § 1983 claim against the School Committee. *See*, *e.g.*, *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001) (dismissing § 1983 claim where complaint fails to make even "bare allegation" of an official policy or custom).

2. Because the Fitzgeralds failed to factually support or develop any argument on the policy/custom issue, they have waived any § 1983 claim against the School Committee.

Beyond their failure to properly plead a § 1983 claim against the School Committee, the Fitzgeralds affirmatively waived any such claim. In response to the Respondents' Fed. R. Civ. P. 12(b)(6) motion to dismiss the § 1983 claims as deficiently pled, the Fitzgeralds proffered a single argument section entitled "Plaintiffs

State a Viable Claim *Against Dever* Under 42 U.S.C. Section 1983." JA 33a (emphasis supplied). This was no mere scrivener's error, given that the Opposition completely ignored the custom/policy issue, with the arguable exception of the following passage:

> The defendants had a policy or practice of ignoring sex discrimination. This is established by their failure to adapt [sic] a policy in conformity with Title IX requisites, by their failure to train or educate staff or students;[sic] and by their deliberate indifference to Jacqueline Fitzgerald.

JA 36a.

This passing reference is woefully inadequate to support a § 1983 claim against the School Committee. For starters, it not only impermissibly asserts facts not contained in the complaint, *see* JA 21a-25a, it states bald (not to mention incorrect) legal conclusions. *See*, *e.g.*, *Schneider v. California Dep't of Corrections*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (court may not look to additional facts alleged in opposition to motion to dismiss when deciding 12(b)(6) motion); *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1216 (1st Cir. 1996) ("a court must take all well-pleaded facts as true, but it need not credit a complaint's 'bald assertions' or legal conclusions").

Perhaps more importantly, the Fitzgeralds failed to offer any factually supported, reasonably developed argument against dismissal of the § 1983 claim on the policy/custom issue, and, as such, that claim was waived. *See*, *e.g.*, *Mote v. Aetna Life Ins. Co.*, 502 F.3d 601, 608

n.4 (7th Cir. 2007) ("if a party fails to press an argument before the district court, he waives the right to present that argument on appeal"); *B&T Masonry Constr. Co., Inc. v. Public Service Mut. Ins. Co.*, 382 F.3d 36, 40 (1st Cir. 2004) ("[t]o preserve a point for appeal, some developed argumentation must be put forward in the nisi prius court. . . ."); *United States v. Elder*, 90 F.3d 1110, 1118 (6th Cir.), *cert. denied*, 519 U.S. 1131 (1996) ("issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived"). Indeed, despite the fact that the Respondents again noted their pleading's deficiencies on the policy/custom issue in a reply to the opposition, *see* JA 40a-42a, the Fitzgeralds neither filed a sur-reply nor moved to amend their complaint to include such allegations.

As further evidence of waiver, the Fitzgeralds failed to assert or support the viability of their § 1983 claim against the School Committee in their opening First Circuit brief. JA 51a-60a. The *single sentence* addressing the entire subject baldly contends that Superintendent Dever's purported refusal to accede to the Fitzgeralds' remedial demands was a "final decision" that "bound" the School Committee such that both could be held liable under § 1983. JA 52a. This cursory comment is insufficient to present the developed argumentation necessary to preserve an issue on appeal. *See United States v. Williams*, 504 U.S. 36, 40 (1992) (recognizing long-standing rule that, in order to be reviewable on appeal, claim, issue or argument must have been "pressed or passed upon below"); *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) (argument deemed waived where inadequately presented on appeal and where proponent

failed to show it was presented below so as to preserve the issue for appeal); *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1110 n.1 (9th Cir. 2000) (en banc) ("issues which are not specifically and distinctly argued and raised in a party's opening brief are waived").

Furthermore, the Fitzgeralds' assertion that Superintendent Dever had the authority to "bind" the School Committee in some unspecified way (a "fact" nowhere found on the record because it is not generally true)[13] is irrelevant to the real issue – that is, whether Dever acted pursuant to an official policy or custom as this Court defines those terms. *See Monell*, 436 U.S. at 690-95. Indeed, the undisputed evidence established that Jacqueline's student-on-student sexual harassment allegation was the first ever received by school officials, JA 46a-50a, and that Dever's response to the Fitzgeralds' isolated complaint affected Jacqueline alone. JA 12a-25a; Pet. App. 2a-4a. These facts – not to mention the First Circuit's ultimate conclusion that the response to the Fitzgeralds' complaint was reasonable – affirmatively preclude any possible finding that a policy or custom caused the alleged injury. *See*, *e.g.*, *Chicago Sch. Reform Bd. of Trustees*, 165 F.3d at 1149 (allegations that school board failed to suppress discriminatory conduct affecting single teacher cannot reasonably be described as a pro-discrimination policy or custom with force of law).

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13. *See* Mass. Gen. L. c. 71, § 59 ("The school committee . . . shall employ a superintendent of schools and fix his compensation. A superintendent . . . shall manage the system in a fashion consistent with state law and the policy determinations of that school committee").

In short, in failing to allege or show an injury based on a policy or custom at any time in this case, the Fitzgeralds have failed to preserve for appeal any § 1983 constitutional claim against the School Committee. The First Circuit's decision in Respondents' favor should therefore be affirmed without regard to Title IX's preemptive effect on such a claim.

3. Because the Fitzgeralds failed to allege or pursue any disparate treatment claim under § 1983, they may not assert any such claim here.

Despite all indications to the contrary in the lower courts, the Fitzgeralds now lay claim to a right to pursue disparate treatment theories – against both the School Committee and Superintendent Dever – under the mantle of a § 1983 claim. *See* Pet. Br. 10. The Fitzgeralds' abject failure to allege or pursue any such theory below bars them from doing so here.

The Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike."[14] *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). As the Fitzgeralds themselves acknowledge (Pet. 7) – and aside from their allegations of deliberate indifference – the only complaint allegation that even arguably implicates equal protection states:

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14. The Equal Protection Clause provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

> Plaintiff Jacqueline Fitzgerald has a clearly established right under state and federal statutory and constitutional law to equal access to all benefits and privileges of a public education, and a right to be free from sexual harassment in school.

JA 23a (¶ 62).

This language simply does not allege a cognizable § 1983 equal protection claim based on state imposed disparate treatment. Even under the most liberal pleading standards, there is no basis for concluding that the Fitzgeralds were even attempting to allege differential treatment of a protected class to which Jacqueline belongs. *See Lynch v. Hubbard*, Nos. 99-1614, 99-1936, 2000 U.S. App. LEXIS 33999 at *2 (1st Cir. Dec. 12, 2000) (summarily affirming dismissal of equal protection claim "inasmuch as plaintiff has not alleged any differential treatment of a protected class to which he belongs"); *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 740 (9th Cir. 2000) (rejecting § 1983 equal protection claim arising out of student-on-student sexual harassment because "there was no evidence of gender animus, nor is there even evidence of a systemwide disparate impact in punishments between genders"). *See also Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002) ("The gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons aggrieved by the state's action").

In response to the Respondents' argument before the district court on this very point, the Fitzgeralds

failed to address the issue in any substantive way, instead cursorily (and incorrectly) claiming that their complaint's invocation of the term "sexual harassment" was sufficient in and of itself to state an equal protection claim and that in this context they need not show selective treatment based on sex. *See* JA 36a-39a. Although this argument might have some sway if a state actor was alleged to have been the sexual harasser (*see*, *e.g.*, Pet. App. 24a-25a), it has no merit here, where the school and its officials are accused *only* of failing to take adequate actions in response to complaints of third party harassment. *See*, *e.g.*, JA 21a (¶¶ 47-48); 23a (¶¶ 60, 64).

Moreover, the Fitzgeralds did not address their ostensible disparate treatment claims' deficiencies in their opening First Circuit brief. *See* JA 51a-60a. In fact, it is only in their merits brief that the Fitzgeralds make their first attempt to proffer *any* legitimate disparate treatment theory, raising for the first time the "possibility that the school discriminated on the basis of sex in both the investigation and the proposed remedy." Pet. Br. 10.

Of course, these are the very factual allegations and legal arguments the Fitzgeralds could have and should have asserted before the district court and the court of appeals. They did not. Rather, the Fitzgeralds alleged no facts and presented no arguments supportive of a disparate treatment claim. Nor did they move to amend their complaint to include such allegations. It goes without saying that a party cannot raise entirely new theories in support of long-dismissed claims before the Supreme Court. *See Howell v. Mississippi*, 543 U.S. 440,

443-44 (2005) (holding certiorari improvidently granted due to petitioner's failure below to properly present claim as one arising under federal law); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n.13 (1976) (barring respondents from raising claim they had neither raised below nor amended their complaint to include).

4. The Fitzgeralds could have and should have pursued any gender-based disparate treatment claim under Title IX.

Perhaps most strikingly, the Fitzgeralds simply assume, but altogether fail to address why, they could not have pursued sex-based disparate treatment theories under Title IX's broad prohibition of sex discrimination in education. Clearly, a claim that school officials discriminated on the basis of gender in investigating and remedying complaints of sexual harassment, Pet. Br. at 10, raises issues at the heart of Title IX's proscriptions. Indeed, courts have addressed issues of discriminatory discipline under Title IX. *See*, *e.g.*, *Mallory v. Ohio Univ.*, 76 Fed. Appx. 634, 641 (6th Cir. 2003); *Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994); *Rue v. Samerjan*, 816 F. Supp. 1326 (E.D Wis. 1993), *aff'd*, 32 F.3d 570 (7th Cir. 1994). Had the Fitzgeralds truly wished to pursue such theories, they could have and should have done so under Title IX.

In any event, the Fitzgeralds did pursue both disparate treatment and disparate impact theories in discovery. *See* JA 48a-50a. There, they not only uncovered no evidence of gender-based animus, they also discovered that Jacqueline's was the first and only complaint of student-on-student sexual harassment

Principal Scully or Superintendent Dever had received. *See Id*. at 46a-50a. Thus, the Fitzgeralds' claim that they were unfairly prevented from pursuing disparate treatment and/or impact theories in this case is simply incorrect in fact and law.

In sum, the question presented – whether Title IX precludes § 1983 claims –assumes that the Fitzgeralds maintain otherwise viable § 1983 claims against the School Committee and Superintendent Dever. Because this assumption is erroneous, the First Circuit's decision should be affirmed without regard to the question presented.

II. THE FITZGERALDS SOUGHT CERTIORARI SOLELY ON THE DISMISSAL OF THEIR OSTENSIBLE § 1983 EQUAL PROTECTION CLAIM AGAINST THE SCHOOL COMMITTEE.

Before discussing the merits of § 1983 preclusion in this case, it must be noted that the Fitzgeralds have significantly enlarged the scope of the question presented in their petition. This is, of course, the question on which the Court granted certiorari. As noted, the Fitzgeralds' petition asks:

> Whether Title IX's implied right of action precludes Section 1983 constitutional claims to remedy *sex discrimination by federally funded educational institutions*.

Pet. i (emphasis supplied).

In their opening brief, the Fitzgeralds present a much broader question:

> Whether Congress intended the right of action that courts have implied under Title IX of the Education Amendments of 1972. 20 U.S.C. § 1681(a), to preclude use of 42 U.S.C. § 1983 to present claims of *unconstitutional gender discrimination in schools.*

Pet. Br. i (emphasis supplied). Thus, the Fitzgeralds' new question, far beyond "sex discrimination by federally funded educational institutions," purports to encompass all "unconstitutional gender discrimination in schools," no matter whom the perpetrator.

The Fitzgeralds no doubt expanded their question so as to include any § 1983 claim they might maintain against Superintendent Dever individually, as Dever is obviously not a "federally funded educational institution." Indeed, based on their more expansive question, the Fitzgeralds' brief comprehensively addresses the issues surrounding a § 1983 claim as against Dever individually. *See*, *e.g.*, Pet. Br. 37-40.

The Court need not consider the merits of any such claim as it is plainly outside of the question set out in the petition. In this regard, Supreme Court Rule 14.1(a) provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Similarly, Supreme Court Rule 24(1)(a) provides that "[t]he brief [on the merits] may not raise additional questions or change the substance of the questions already presented in" the petition for certiorari. As this Court has held, issues

that are related or complementary to the question actually presented in the petition are *not* fairly included therein. *Yee v. City of Escondido*, 503 U.S. 519, 537 (1992).

Based on the much more limited petition question, the Court should regard issues involving any § 1983 claim against Dever individually as outside the petition. Indeed, such a ruling, in combination with the Fitzgeralds' failure to allege or show a policy or custom for purposes of School Committee liability under § 1983, *see* Argument § I.B. above, would all but require that this matter be dismissed.

III. TITLE IX'S COMPREHENSIVE REMEDIAL SCHEME PROHIBITING SEX DISCRIMINATION IN EDUCATION PRECLUDES VIRTUALLY IDENTICAL § 1983 EQUAL PROTECTION CLAIMS.

A. The Standard For Preclusion of § 1983 Claims: *Smith* And *Rancho Palos Verdes*.

Even were the Court to reach the merits of the question presented in the Fitzgeralds' opening brief, the First Circuit's decision should be affirmed. It is well-established that a sufficiently comprehensive remedial statute may preclude § 1983 constitutional claims that are virtually identical to those that are or could be brought under the statute. *Smith*, 468 U.S. at 992.

"The crucial consideration is what Congress intended." *Id*. at 1012. "[E]vidence of such congressional intent may be found directly in the statute creating the right, or inferred from the statute's creation of a

'comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.'" *Rancho Palos Verdes*, 544 U.S. at 120, quoting *Blessing v. Freestone*, 520 U.S. 329, 341 (1997). *See also Nat'l Sea Clammers Ass'n*, 453 U.S. at 20 ("When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983").

Indeed, when Congress chooses to grant a private means of redress in a statute, it raises an "ordinary inference that the remedy provided in the statute is exclusive. . . ." *Rancho Palos Verdes*, 544 U.S. at 122. *See also Id.* at 127 (Breyer, J., concurring) ("The Court today provides general guidance in the form of an 'ordinary inference' that when Congress creates a specific judicial remedy, it does so to the exclusion of § 1983"). *See also Smith*, 468 U.S. at 1012 (holding that because § 1983 is a statutory remedy, "Congress retains the authority to repeal or replace it with an alternative remedy").

As a practical matter, this "ordinary inference" largely explains the Court's precedent on the subject of § 1983 preclusion. In all the cases in which it found § 1983 available to redress the deprivation of a federal right, the Court "emphasized that the statute at issue . . . *did not* provide a private judicial remedy (or, in most cases, even a private administrative remedy) for the rights violated." *Rancho Palos Verdes*, 544 U.S. at 121-22 (collecting cases) (emphasis in original).

By contrast, the decisions in which the Court found § 1983 unavailable – *Sea Clammers*, *Smith*, and *Rancho*

Palos Verdes – "rested upon the existence of more restrictive remedies provided in the violated statute itself." *Rancho Palos Verdes*, 544 U.S. at 121. "Thus, the existence of a more restrictive private remedy for statutory violations has been the dividing line between those cases in which we have held that an action would lie under § 1983 and those in which we have held that it would not." *Id.*

The rationale behind this conclusion is the Court's presumption "that limitations upon the remedy contained in the statute are deliberate and are not to be evaded through § 1983." *Id.* at 124. *Accord Smith*, 468 U.S. at 1009 (finding § 1983 claim precluded where Congress intended plaintiffs to pursue their claims "through the carefully tailored administrative and judicial mechanism set out in the statute").

Application of these principals to this case leads to the inevitable conclusion that Title IX's comprehensive remedial scheme precludes virtually identical § 1983 equal protection claims for gender discrimination in education. The Fitzgeralds § 1983 claims against the School Committee and Superintendent Dever were therefore properly dismissed.

B. Title IX Is A Comprehensive Remedial Statutory Scheme.

1. Title IX provides a complex administrative enforcement scheme.

As an initial matter, Title IX provides a complex administrative enforcement scheme designed to ensure compliance with its mandates. *See* 20 U.S.C. § 1682; 34 C.F.R. §§ 106.1-106.71; 34 C.F.R. §§ 100.6-100.11 (adopted and incorporated by reference into 34 C.F.R. § 106.71). Under this scheme, educational recipients of federal financial assistance must implement policies providing that they do not and may not discriminate on the basis of sex, 34 C.F.R. § 106.3(c), and must regularly disseminate such policies to students, parents and employees. *Id.* at § 106.9. Educational institutions must also designate employees to coordinate its efforts to comply with and carry out Title IX's requirements, including complaint investigations. *Id.* at § 106.8.

Recipients are further required to keep appropriate records and submit compliance reports to the Department of Education ("DOE") upon request. 34 C.F.R. § 100.6. Persons subjected to sex discrimination can file complaints with the DOE, *see Id.* at § 100.7(b), and the DOE must then promptly investigate the allegations, *Id.* at § 100.7(c). The DOE may also periodically conduct its own compliance reviews without a complaint. *Id.* at § 100.7(a).

If the DOE concludes that a complaint has merit or discovers violations stemming from its own review, it will notify the institution and attempt to reconcile the

situation through informal means. *Id.* at § 100.7(d). If the DOE is unsuccessful, it may suspend or terminate federal funding to the institution after an administrative hearing. *Id.* § 100.8. Any decision after hearing is subject to judicial review. 20 U.S.C. § 1683; 34 C.F.R. § 100.11. Thus, in Title IX, Congress created a comprehensive administrative remedial scheme with "strong incentive for schools to adopt policies that protect federal civil rights." *Waid v. Merrill Area Pub. Schs.*, 91 F.3d 857, 862-63 (7th Cir. 1996).

2. Title IX provides a private cause of action for damages.

In addition to administrative process and remedies, Title IX offers a full complement of private judicial remedies to individuals through its private cause of action. *See Cannon*, 441 U.S. at 709. "Once in court, the Title IX plaintiff has access to a full panoply of remedies including equitable relief and compensatory damages." *Bruneau v. South Kortright Cent. Sch. Dist.*, 163 F.3d, 749, 757 (2d Cir. 1998), *cert. denied*, 526 U.S. 1145 (1999), citing *Franklin*, 503 U.S. at 73-76. The existence of a sweeping private remedy is further evidence of Congress's intent to preclude a § 1983 remedy with Title IX. *See Wright v. City of Roanoke Redev. and Housing Auth.*, 479 U.S. 418, 427 (1987).

Despite the Fitzgeralds' protestations, Pet. Br. 45-48, the fact that Title IX's private remedy is implied rather than discernible on the statute's face makes no difference in this analysis. In *Cannon*, this Court concluded that Congress intended that Title IX provide a private remedy: "Not only the words and history of

Title IX, but also its subject matter and underlying purposes, counsel implication of a cause of action in favor of private victims of discrimination." *Cannon*, 441 U.S. at 709. *See also Id.* at 694-703 (thoroughly reviewing Title IX's legislative history with regard to the existence of a private remedy) and 694 (concluding that "the history of Title IX rather plainly indicates that Congress intended to create such a remedy"); *Bruneau* at 163 F.3d at 757 (holding Title IX's legislative history demonstrates both clear Congressional intent to provide private right of action and to subsume § 1983 claim based upon the same deprivation of rights).

Indeed, Congress has essentially ratified *Cannon*'s conclusions about its intent, since amending Title IX in ways both clarifying and expanding plaintiffs' private remedial rights against schools. For example, in 1986, Congress abrogated state Eleventh Amendment immunity under Title IX. 42 U.S.C. § 2000d-7. In 1987, Congress mandated that courts give Title IX "broad application" so as to hold liable discriminatory programs in institutions that receive federal funds regardless of whether the particular program itself receives federal funds. 20 U.S.C. § 1687. *See also Cannon*, 441 U.S. at 685 n.6 (concluding that Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. § 1988, "was clearly intended, inter alia, to allow awards of fees on behalf of 'private' victims of discrimination who have successfully brought suit in court. . . .").

In short, beyond what it said in Title IX's original iteration, Congress has since spoken on the issue of private remedies, passing additional legislation that – if not explicitly stating as much – plainly presumes the existence of such remedies. *See Franklin*, 503 U.S. at 78 (Scalia, J., concurring) (concluding that amendments to Title IX "must be read . . . not only as a validation of *Cannon*'s holding, but also as an implicit acknowledgment that damages are available") (internal quotations and citations omitted).

Given Congress's clear intent in the statute and its amendments, Title IX's private remedies must be considered part of its overall remedial scheme for purposes of preclusion analysis. *See* Pet. App. 19a; *Bruneau*, 163 F.3d at 757; *Waid*, 91 F.3d at 862-63; *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779, 789 (3d Cir. 1990). Indeed, to confer some lesser status on such remedies because they were "implied" would essentially overrule *Cannon* and disregard Congress's subsequent endorsement thereof, an approach that must be rejected. *See Franklin*, 503 U.S. at 78 (Scalia, J., concurring) ("Because of legislation enacted subsequent to *Cannon*, it is too late in the day to address whether a judicially implied exclusion of damages under Title IX would be appropriate").

The preclusion analysis is therefore most straightforward. Considering all aspects of its fulsome administrative and private remedies, there can be little doubt that in Title IX Congress created a comprehensive remedial statutory scheme for sex discrimination in education. *See* Pet. App. 17a-24a; *Bruneau*, 163 F.3d at 757; *Waid*, 91 F.3d at 862-63; *Pfeiffer*, 917 F.2d at 789. The "ordinary inference," therefore, is that Congress intended Title IX to be the exclusive remedy for sex discrimination in education. *Rancho Palos Verdes*, 544 U.S. at 122.

3. Title IX's remedies are more restrictive than § 1983's in significant ways.

Remedies, not rights, are the touchstone of preclusion analysis. *Rancho Palos Verdes*, 544 U.S. at 120-21 ("The critical question, then, is whether Congress meant the judicial *remedy* expressly authorized by [the statute] to coexist with an alternative *remedy* available in a § 1983 action") (emphasis supplied). Given Title IX's broad, absolute prohibition against sex discrimination in education, *see* 20 U.S.C. § 1681(a), it provides greater *rights* to combat such discrimination than does the Equal Protection Clause, which allows discrimination where there is an important government interest. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

Nevertheless, Title IX's *remedies* are in significant ways more restrictive than those of § 1983. And as this Court has emphasized, a limitation on statutory remedies "is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983." *Rancho Palos Verdes*, 544 U.S. at 120-21.

Most significantly, a Title IX claim may be brought only against educational institutions and not individuals. Although this Court has not ruled on this specific issue, courts are in general agreement that Title IX's focus on "recipients of federal funds" reflects Congress's intent that the onus of compliance for sex discrimination should be placed on the institutional recipients and not the individual employees of recipients. *See*, *e.g.*, *Hartley v. Parnell*, 193 F.3d 1263, 1270 (11th Cir. 1999); *Smith v. Metro. Sch. Dist. Perry Twnshp.*, 128 F.3d 1014, 1018-19 (7th Cir. 1997), *cert. denied*, 524 U.S. 951 (1998); *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 901 (1st Cir. 1988). *Cf. Davis* 526 U.S. at 641 ("The Government's enforcement power may only be exercised against the funding recipient [ ] and we have not extended damages liability under Title IX to parties outside the scope of this power").

Institutional liability is consistent with Title IX's goal of eradicating gender discrimination by establishing institutional, not individual, obligations. For example, Title IX establishes administrative requirements such as formulating, instituting and disseminating anti-discrimination policies and designating Title IX coordinators – requirements that focus the onus of Title IX compliance on the institution, not its employees. *See*, *e.g.*, 20 U.S.C. § 1682; 34 C.F.R. §§ 106.1-106.71;

34 C.F.R. §§ 100.6-100.11. *See also Waid*, 91 F.3d at 862 ("Congress intended to place the burden of compliance with civil rights law on educational institutions themselves, not on the individual officials associated with those institutions"). Placing compliance obligations solely on institutions also squares not only with the statute's words, but with the notion that Title IX "amounts essentially to a contract between the Government and the recipient of funds," *Gebser*, 524 U.S. at 286, not the recipients' employees. *See* Pet. App. 21a.

In contrast to Congress's clear intent that liability for sex discrimination in education attach exclusively to institutions, § 1983 claims may be brought against both institutional and individual state actors. 42 U.S.C. § 1983; *West v. Atkins*, 487 U.S. 42, 48-51 (1988). Congress's deliberate choice to limit Title IX remedies for sex discrimination in education to institutions should not be evaded through use of § 1983.

To allow otherwise would make the remedial construct of Title IX meaningless and totally ignore congressional intent. *See* Pet. App. 21a-22a ("Sanctioning section 1983 actions against individual school officials would permit an end run around [ ] manifest congressional intent"); *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 640 (7th Cir. 1999), *cert. denied*, 530 U.S. 1284 (2000) ("The fact that individual claims are not available under Title IX means that Congress has chosen suits against institutions as the means of redressing such wrongs"), citing *Sea Clammers*, 435 U.S. at 20.

By holding only institutions liable, Congress limited Title IX's remedies in another significant way. Punitive damages are unavailable against educational institutions under Title IX. *See Barnes v. Gorman*, 536 U.S. 181, 189-90 (2004) (holding that Title VI – and implying that Title IX – does not provide for punitive damages). Neither are punitive damages available against municipalities under § 1983. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981). However, punitive damages are available from government officials when they are sued under § 1983 in their individual capacities. *Id.* This important limit on Title IX remedies should not be circumvented through use of § 1983 claims against individual school officials.

Moreover, Title IX limits liability by imposing a much higher notice requirement than that of § 1983. Under Title IX, in accordance with this Court's determinations of congressional intent, liability in third party sexual harassment cases is imposed only where a school acts with deliberate indifference to sexual harassment about which it had actual notice. *Gebser*, 524 U.S. at 285-86; *Davis*, 526 U.S. at 646-47. In contrast, under § 1983, constructive notice suffices for purposes of establishing that a state actor's response to a constitutional violation was deliberately indifferent. *See Farmer v. Brennan*, 511 U.S. 825, 841 (1994). Title IX's actual notice standard would be evaded if resort to a § 1983 claim were allowed. *See* Pet. App. 22a.

In sum, Title IX provides significantly more restrictive remedies than does § 1983, placing it squarely within the group of statutes this Court has found to exclude § 1983 claims. *Rancho Palos Verdes*, 544 U.S. at 121. "[B]y providing a judicial remedy different from § 1983 . . . [Title IX] preclude[s] resort to § 1983." *Id.* at 127.

C. Because The Fitzgeralds' Title IX And § 1983 Claims Against The School Committee And Superintendent Dever Are "Virtually Identical," Preclusion Is Required.

In the context of a § 1983 claim based on the Constitution, the Court has imposed an additional factor on the preclusion analysis. That is, § 1983 constitutional claims will be precluded by a comprehensive remedial statute when those claims are also "virtually identical" to claims that are or could be brought under the statute. *Smith*, 468 U.S. at 1009.

The Fitzgeralds' § 1983 allegations that Jacqueline's equal protection rights were violated are based on the exact same factual predicate as their Title IX claim against the School Committee – that is, that the school responded to their complaint of harassment with deliberate indifference. JA 12a-25a. Indeed, the First Circuit has already ruled as a matter of fact and law that as with their Title IX claim, the Fitzgeralds "offer no theory of liability under the Equal Protection Clause other than the defendants' supposed failure to take adequate actions to prevent and/or remediate the peer-on-peer harassment that Jacqueline experienced." Pet. App. 23a. *See* Argument § I.A. above. Moreover, having failed to appeal from this aspect of the First Circuit's decision, the Fitzgeralds cannot challenge it here. *See* Pet. Br. 8-9 n.1.

As such, under *Rancho Palos Verdes* and *Smith*, the Fitzgeralds' virtually identical § 1983 equal protection claims are precluded by Title IX's comprehensive remedial scheme. *See Smith*, 468 U.S. at 1013 ("We conclude, therefore, that where the [Education of the

Handicapped Act, 20 U.S.C. § 1400 *et seq*. ("EHA")] is available to a handicapped child asserting a right to a free appropriate public education, based either on the EHA or on the Equal Protection Clause of the Fourteenth Amendment, the EHA is the exclusive avenue through which the child and his parents or guardian can pursue their claim"). The Fitzgeralds' § 1983 claims were therefore properly precluded.

D. The Fitzgeralds' Arguments That Congress Did Not Intend Title IX To Be Exclusive Are Without Merit.

The Fitzgeralds' attempts to skirt Title IX's language and the ramifications of this Court's preclusion precedent are without merit. Most obviously flawed is the Fitzgeralds' wholesale reliance on comparisons to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which prohibits race discrimination by recipients of federal financial assistance. *See* Pet. Br. 15-25.

As an overarching matter, this Court has warned that excessive focus on Title VI in interpreting Title IX

> is *misplaced*. It is Congress' intention in 1972 [when Title IX was enacted], not in 1964, that is of significance in interpreting Title IX. The meaning and applicability of Title VI are useful guides in construing Title IX, therefore, only to the extent that the language and history of Title IX do not suggest a contrary interpretation . . . For although two statutes may be similar in language and objective, we

> must not fail to give effect to the differences between them.

North Haven Bd. of Ed. v. Bell, 456 U.S. 512, 529-30 (1982) (internal citations omitted) (emphasis added). Here, the statutes' differences wholly undermine the validity of any argument that Congress had some uniform intent with respect to each.

1. That Title IX prohibits sex, not race, discrimination requires that it be viewed differently than Title VI.

The Fitzgeralds' main argument against preclusion is based on the false premise that Congress believed, in 1972, that § 1983 provided broad remedies for sex discrimination in education, which Title IX was merely intended to supplement. *See* Pet Br. 15-24. According to the Fitzgeralds, given § 1983's historical significance in race discrimination cases, Congress did not intend for Title VI, in 1964, to preclude § 1983 – a fact born out by subsequent cases allowing concurrent claims under each statute. *Id.* Because Congress based Title IX on Title VI, the argument goes, Congress must have had the same non-preclusive intent with respect to Title IX and § 1983. *Id.*

This argument fails to account for the critical differences between race and sex discrimination. As of 1972, the sole sex-based equal protection case the Court had decided employed a rational basis standard of review.[15]

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15. The current heightened scrutiny standard applicable to constitution-based gender discrimination claims was four years from being adopted. *See Craig*, 429 U.S. at 197.

See Reed v. Reed, 404 U.S. 71 (1971). At that time, therefore, the Fourteenth Amendment only prohibited irrational classifications based on sex. *Id.*

As such, the Fitzgeralds claims of how Congress (and the courts) viewed the interplay between Title VI and § 1983 notwithstanding, *see* Pet Br. 15-24, Congress simply could not have believed that the Equal Protection Clause offered any meaningful remedy for sex discrimination by schools. Congress obviously passed Title IX with the intent that it, and not § 1983, would broadly govern claims of sex discrimination by schools.

Similarly, at the time Congress passed Title IX in June, 1972, it had only just recently, in March 1972, sent the Equal Rights Amendment to the states for ratification. *See Frontiero v. Richardson*, 411 U.S. 677, 687 (1973). The ERA would have amended the Constitution to guarantee equal rights regardless of sex. *Id.* Congress's near simultaneous passage of the ERA and Title IX further undermines any claim that Congress, in 1972, could possibly have considered the Equal Protection Clause an effective alternative vehicle for combating sex discrimination in education. The Fitzgeralds' claims otherwise are baseless.

2. That Title IX applies only to educational institutions, not all recipients of federal funds, requires that it be viewed differently than Title VI.

Another difference is that, unlike Title VI, which applies to all recipients of federal funds, Title IX applies only to educational institutions. *See Cannon*, 441 U.S. at 694 n.16. At the time Title IX was passed, the Court had not yet ruled that schools could be sued for damages under § 1983. *See Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 279 (1977) (leaving to "another day" the question of "whether a school district is a person" for purposes of Section 1983). *See also Monell*, 436 U.S. at 644-89 (1978) (overruling *Monroe v. Pape*, 365 U.S. 167 (1961) to hold for first time that local government units may be considered "persons" under § 1983). Thus, it makes no sense to argue, as do the Fitzgeralds, that Congress had some unstated intent in Title IX to add to existing § 1983 remedies for sex discrimination by schools when no such § 1983 remedies then existed.

Furthermore, broadly cognizant of the unique and vitally important role of education in our society, this Court has long recognized the special place of schools and their employees under the law. For example, public school students' First Amendment and Fourteenth Amendment due process rights are significantly limited. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995). *See also Morse v. Frederick*, 127 S. Ct. 2618, 2627, 168 L. Ed. 2d 290, 301 (2007) (holding First Amendment rights of students must be applied in light of special characteristics of school environment). These cases are based on the notion that schools have "custodial and

tutelary responsibility for children." *Vernonia Sch. Dist. 47J*, 515 U.S. at 656.

Furthermore, and of more particular relevance to the facts of this case, schools and their officials have long been accorded significant deference in the maintenance of discipline in the educational setting. *See*, *e.g.*, *Davis*, 526 U.S. at 648) (cautioning that "courts should refrain from second guessing the disciplinary decisions made by school administrators"); *Ingraham v. Wright*, 430 U.S. 651, 681-82 (1977) ("Assessment of the need for, and the appropriate means of maintaining, school discipline is committed generally to the discretion of school authorities. . . ."). These cases recognize that school administrators must be free to take "immediate, effective action" to maintain discipline in public schools, as "[s]ome modicum of discipline and order is essential" to ensure the viability of the education system. *Goss v. Lopez*, 419 U.S. 565, 580 (1975).

Indeed, given the "special characteristics of the school environment," *Morse v. Frederick*, 127 S. Ct. at 2627, Title IX more broadly reflects Congress's intent that all funds recipients, public and private, be treated similarly for purposes of gender discrimination. There is simply no basis for believing that Congress, in passing Title IX, intended to impose the additional burdens of § 1983 actions on financially-strapped public schools and their employees.

Furthermore, and in contrast to Title VI, the foregoing precedent – as does Title IX itself – recognizes the special place of educational institutions in the law. Limiting remedies for gender discrimination in

education to those provided by Title IX fully comports with overarching and well-established considerations grounded in the unique role of educational institutions in our society.

E. Like § 1983 Claims, *Bivens* Actions For Constitutionally-Based Causes Of Action Are Precluded By Statutes Providing Meaningful Remedies.

As the Fitzgeralds point out, constitutional tort actions against federal officers (so-called "*Bivens* actions") are "comparable, for present purposes, to the section 1983 cause of action presented in this case." Pet. Br. 38. In *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), the Court held that plaintiffs may sue federal officials for money damages for Fourth Amendment violations, even without an express statutory cause of action analogous to § 1983. *Accord Davis v. Passman*, 442 U.S. 228 (1979) (recognizing *Bivens* action for violations Fifth Amendment); *Carlson v. Green*, 446 U.S. 14 (1980) (same under Eighth Amendment).

Given their parallel causes of action for constitutional violations – *Bivens* against federal actors and § 1983 against state actors – the analogy between the claims is apt. Indeed, just as § 1983 constitutional claims are precluded by alternative statutory remedies, *see Smith*, 468 U.S. at 1011, so too are *Bivens* actions. For example, in *Bush v. Lucas*, 462 U.S. 367 (1983), the Court refused to recognize a claim for First Amendment violations arising out of the federal employment relationship. The Court reasoned that because Congress chose to implement a federal civil service system that

"provided meaningful remedies for employees who may have been unfairly disciplined for making critical comments about their agencies," a *Bivens* claim was inappropriate. 462 U.S. 386. And this was true even though those administrative "remedies do not provide complete relief for the plaintiff." *Id.* at 388.

Similarly, in *Schweiker v. Chilicky*, 487 U.S. 412 (1988), the Court refused to allow a *Bivens* action by disabled social security beneficiaries who, although eventually receiving wrongfully withheld benefits, were provided no remedy for emotional distress and other hardships due to the delay in payment. *Id.* at 425. As in *Bush*, Congress had failed to provide for "complete relief" but had nevertheless created a wide-ranging administrative remedial system that provided "meaningful safeguards or remedies." *Id.* Because "Congress is the body charged with making the inevitable compromises required in the design of a massive and complex welfare benefits program," the Court ruled that a *Bivens* action would be inappropriate. *Id.* at 429. *See also Id.* at 423 ("When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies").

Thus, despite the Fitzgeralds' attempts to portray this case as an outrageous trampling of their constitutional rights and remedies, it simply is not so. The *Bivens* cases illustrate that resort to a constitution-based cause of action is regularly prohibited if Congress deems alternative remedies acceptable.

Indeed, the *Bivens* cases' limitations on constitution-based tort actions are arguably much more extreme than those contemplated by the preclusion of virtually identical § 1983 equal protection claims at issue here. For example, unlike § 1983 preclusion analysis, *Bivens* precedent does not require that the precluding statute provide a comprehensive remedial scheme or that the claims asserted under the statute and § 1983 be virtually identical. *See Smith*, 468 U.S. at 1009. Rather, to preempt resort to a *Bivens* action, a statute need only provide "meaningful remedies" that do not necessarily provide complete relief. *See Bush*, 462 U.S. 386-88.

As the Court's *Bivens* authority illustrates, there exists a long and well-accepted history of statutory provisions limiting constitution-based claims. Title IX's preclusion of the virtually identical § 1983 equal protection claims is well within the pale of this clear precedent.

F. Title IX Preclusion Of § 1983 Equal Protection Claims Is Appropriate Under This Court's Established Precedent And Will Support Congressional Efforts To Eradicate Sex Discrimination In Schools.

In the Fitzgeralds' view, without the right to raise equal protection claims under § 1983, their daughter's right to be free from sex discrimination will be diminished. However, the Fitzgeralds are mistaken.

By affirming the First Circuit's opinion and applying the standards already developed under *Smith* and

Rancho Palos Verdes, the Court will be supporting Congress's intent to place the burden of eradicating gender discrimination squarely on the shoulders of educational institutions, without diminishing individuals' rights to pursue private causes of action. Indeed, by the threat to withdraw federal financial assistance, Congress has utilized the often most effective means – the power of the purse – to ensure that educational recipients implement effective non-discrimination programs. That individuals may utilize the private right of action as found in *Cannon* to obtain injunctive relief, damages and attorneys fees to vindicate their rights on an individual basis under Title IX enhances Title IX's effectiveness.

Consequently, the requirement that claims of sex discrimination (including harassment by teachers and/or students) be resolved under Title IX will not result in any diminution of rights. Indeed, Title IX's absolute prohibition against sex discrimination in education is more comprehensive than the Equal Protection Clause, under which sex discrimination is subject to intermediate scrutiny.

The construct articulated by the First Circuit provides a sensible resolution to the split between the various circuits on the preclusion issue. Where, as here, the Title IX and § 1983 equal protection claims arise out of student-on-student harassment, and the theories of liability are identical and based on the same facts, it makes sense to subsume claims for sex discrimination against both the educational institution and the individual acting on that institution's behalf into Title IX. If, however, as the First Circuit recognized, the facts relating to the actions of the state actor are different from those of the institution, then such claims will not be precluded. This case-specific rule offers the most rational approach to the issue of concurrent claims under Title IX and § 1983.

CONCLUSION

For all of the foregoing reasons, the First Circuit's ruling should be affirmed.

Respectfully submitted,

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